



**OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN**

**GERALD C. MANN
ATTORNEY GENERAL**

April 13, 1939

**Honorable T. M. Trimble
First Assistant State Superintendent
Austin, Texas**

(Overruled by O-604-A)

Dear Sir:

Opinion No. O-604

Re: Status of a County Superintendent called into the United States Army in time of war, and method of providing for his successor

We are in receipt of your letter of April 7, 1939, wherein you request our opinion in response to the following questions:

- (1) If a county superintendent is an official, and in this case a First Lieutenant in the Texas National Guard, and war should be declared, calling him into active service within three days, what would be the exact procedure in the filling of his office as county superintendent?**
- (2) Would this County Superintendent be given a leave of absence officially, and if so, by whom?**
- (3) Would his office be filled by a body either the Commissioners' Court or the County Board of Education?**
- (4) If so, for how long?**
- (5) If the County Superintendent were in service a year or eighteen months could he return to his office that he had vacated by reason of his being called to war?**
- (6) Could he select his temporary successor?**

Article 2355, Revised Civil Statutes, reads as follows:

"The Court shall have power to fill vacancies in the office of: County Judge, County Clerk, Sheriff, County Attorney, County Treasurer, County Surveyor, County Elde Inspector, Assessor Taxes, Collector of Taxes, Justices of the Peace, Constables, and County Superintendent of Public Instruction. Such vacancies shall be filled by a majority vote of the members of said Court, present and voting, and the person chosen shall hold office until the next general election."

Article 16, Section 12 of the Constitution of Texas reads as follows:

"No member of Congress, nor person holding or exercising any office of profit or trust, under the United States, or either of them, or under any foreign power, shall be eligible as a member of the Legislature, or hold or exercise any office of profit or trust under this State."

In the case of Lowe vs. State, 201 S. W. 984, a District Judge became an officer in the National Guard on the 18th day of July, 1917, and went on the payroll of the federal government as an officer in the military service August 4, 1917. We quote from the opinion of the court in that case, as follows:

"It is believed, however, that when a judge of one of the courts of the state becomes an officer in the United States army that the matter of vacancy is not controlled by section 17 of article 16 of the Constitution, but is controlled by section 12 of said article which provides, in substance, that no person holding or exercising any office of profit or trust under the United States shall be eligible to hold or exercise any office of profit or trust under this state. This conclusion is supported by the decision of the Supreme Court of this state in State vs. De Gress, 55 Tex. 400. Other cases bearing on the subject are Bishop vs. State, 149 Ind. 223, 48 N. E. 1038, 39 L. R. A. 278, 63 Am. St. Rep. 279; Oliver v. Jersey City, 68 N. J. Law, 104, 42 Atl. 784. See, also, notes in 83 Am. Dec. 375; 12 L. R. A. 125

"Applying this view to the facts of the present case, it appears that on the date following the election of the special judge the regular judge vacated his office. Section 7 of Article 5 of the Constitution contains the

Honorable T. M. Trimble, April 13, 1939, page 3

following provision:

"The Legislature shall also provide for the holding of district court when the judge thereof is absent, or is from any cause disabled or disqualified from presiding."

Under Article 16, Section 12 of the State Constitution, as interpreted by the Court of Criminal Appeals in *Lowe vs. State*, supra, the office of County School Superintendent will become automatically vacant, when the incumbent joins the United States Army. The answer to your first question is found in Article 2355, which provides that the vacancy shall be filled by a majority vote of the members of said Court present at the voting. "Said Court" refers to Commissioners' Court. Addressing ourselves to your second question, we must advise that once the County Superintendent is in the United States Army, he is away not on leave of absence from the County Superintendent's office, but he will have vacated the same entirely. The answer to your third question is that the Commissioners' Court would be the body which would fill the vacancy. With reference to your fourth question, as provided in Article 2355 the person who might be chosen as his successor would hold his office until the next general election after he was appointed to such office. In answer to your fifth question, we must advise that when this man should be discharged from the Army he could not return to the office of County Superintendent, unless such office should at that time become vacant, and he should be appointed or elected thereto. Your sixth question has already been answered. As indicated above, the only body or person authorized to appoint his successor would be the Commissioners' Court. He could not select his own successor.

APPROVED:
/s/ Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

Very truly yours
ATTORNEY GENERAL OF TEXAS

By /s/
Glenn R. Lewis
Assistant

GRL:go

GRL:ga